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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 603

FIRST IOWA HYDRO-ELECTRIC COOPERATIVE,
PETITIONER

v.

FEDERAL POWER COMMISSION

STATE OF IOWA, INTERVENOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia (R. 43–61) is reported in 151 F. 2d 20. The opinion and order of the Federal Power Commission (R. 8–14) are reported in 52 P. U. R. (NS) 82.

JURISDICTION

The judgment of the Court of Appeals was entered on August 14, 1945 (R. 61–62). The petition for a writ of certiorari was filed on November

13, 1945, and was granted on January 2, 1946 (R. 71). The jurisdiction of this Court rests upon Section 313 (b) of the Federal Power Act (49 Stat. 860, 16 U. S. 825*l*) and Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The petitioner applied to the Federal Power Commission for a license to construct, operate, and maintain a power project in Iowa, on a navigable water of the United States. Section 9 (b) of the Federal Power Act requires that an applicant submit to the Commission "satisfactory evidence that the applicant has complied with the requirements of the laws of the State * * * with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act." The petitioner made no showing of any attempt to comply with Sections 7767, 7771, and 7776 of Chapter 363 of the Iowa Code of 1939 and sought to excuse its failure on the ground that the state statutory provisions were either inapplicable or invalid, as applied to the proposed project, having been superseded by the Federal Power Act. The State of Iowa intervened and urged that the application be denied because petitioner had not been

granted a permit by the State Executive Council. The Commission denied the petitioner's application without prejudice to renewal within one year upon satisfying the requirements of Section 9 (b), and the court below affirmed. The questions presented are:

1. Whether the Commission correctly held that it could not issue a license to the petitioner in the light of petitioner's failure to adduce evidence of compliance with Sections 7767, 7771, and 7776 of the Iowa Code.

2. Whether the court below properly refused to pass upon the constitutional validity of Chapter 363 of the Iowa Code of 1939, and properly remitted the petitioner to its state remedies.

3. Whether, if this Court reaches the question of the validity of the provisions of Chapter 303 of the Iowa Code of 1939, those provisions, as construed by the Attorney General of Iowa with reference to the proposed project, are unconstitutional.

STATUTES INVOLVED

The pertinent provisions of the Federal Power Act (June 10, 1920, c. 285, 41 Stat. 1063, as amended August 26, 1935, c. 687, 49 Stat. 838, 16 U. S. C. 791a–825r) may be found in a pamphlet copy of the Act submitted with this brief, and the pertinent provisions of Chapter 363 of the Iowa Code, are set forth in Appendix A, *infra*, pp. 59–61.

STATEMENT

Upon a declaration of intention to construct a hydroelectric power development on the Cedar River in the State of Iowa, filed by petitioner under Section 23 (b) of the Federal Power Act, the Commission found, after investigation, that the Cedar River and the Iowa River into which it flows are navigable waters of the United States (R. 10, note) and that the proposed project would affect the navigable capacity of the Mississippi River and the interests of interstate commerce. *First Iowa Hydro-Electric Cooperative,* 2 F. P. C. 958, 959, 960.

Thereafter, on August 11, 1941, petitioner filed an application for a license under Section 4 (e) of the Act (R. 1–8), and subsequently filed supplements to the application modifying the project in certain particulars (R. 10). The project for which a license ultimately was sought consisted of a dam across the Cedar River, some twenty-one river miles above and north of its confluence with the Iowa River, and about fifty river miles above and northeast of the confluence of the latter with the Mississippi River, and a diversion canal to carry the water about eight miles from the reservoir created by the dam on the Cedar River eastwardly to a power plant through which the water would be discharged into the Mississippi River, about twenty-five river miles above and north of the point at which the Iowa River flows

into the Mississippi (R. 10–11, 31–33; for map, see Tr. 2957, not printed but in the original transcript on file with the Clerk). The modified project included changes suggested by the Chief of Engineers of the War Department (R. 11). By these modifications of the original design, it was proposed that the water of the Cedar River, instead of being discharged downstream past the dam, so as to develop power from a fall of approximately thirty-five feet, would be discharged into the Mississippi, with a fall of about 101 feet to produce almost three times as much power.

The application[1] filed by petitioner had attached to it an Exhibit C stating that "there are no valid laws which are applicable to the building and operation of the project", other than those referring to public highways; an Exhibit D, stating, with respect to public property and compliance with state highway and bridge laws, that applicant had obtained permits from the Iowa State Highway Commission (dated May 29, 1940), the Muscatine County Board of Supervisors (dated August 1, 1940), and the Cedar

[1] This application appears at R. 1–8, and the exhibits attached thereto may be found in the original transcript on file with the Clerk. For the convenience of this Court, we have reprinted the exhibits relating to compliance with state law as Appendix B to this brief, *infra*, pp. 64–76. See also the Commission's Rules of Practice and Regulations with reference to a showing of compliance with state law in the application for a license. Appendix A, *infra*, pp. 62–63.

County Board of Supervisors (dated May 3, 1940); and an Exhibit E, stating that applicant owned no water rights on August 8, 1941, but contemplated obtaining the necessary water rights by purchase and condemnation, that applicant has contracts with the Federal Construction Company under which it would acquire "practically all of the riparian rights to all of the land on the Cedar River from the site of the primary diversion dam and extending to the junction of the Cedar and Iowa Rivers", that applicant's counsel advised that "there is no provision in the state law by which he may obtain the use of water for diversion of the Cedar River to the Mississippi and that no valid state law exists which is applicable to his project", and that "Applicant has complied with all state requirements such as those referring to Public Highways, Public Property and Public Health."

At the hearings (R. 20–29) on the application, the State of Iowa intervened (Tr. 6)[1] and objected to the issuance of the license on the ground, *inter alia*, that petitioner had not met the requirements of Section 9 (b) of the Federal Power Act in that it had failed to submit "evidence of compliance" with Chapter 363 of the Iowa Code prohibiting construction of a dam "in any navigable or meandered stream for any purpose, or in any

[1] The unprinted transcript of the record as filed in this Court is referred to as "Tr."

other stream for * * * power purposes," unless a permit has been granted by the State Executive Council (Section 7767, Appendix A, *infra*, p. 59).[3] The state statute provides that such a permit shall be issued only if it appears to the Executive Council that, among other things, the dam "will not materially obstruct existing navigation * * *, and any water taken from the stream in connection with the project is returned thereto at the nearest practicable place without being materially diminished in quantity" (Section 7771, Appendix A, *infra*, p. 60).

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[3] The Iowa State Executive Council consists of the Governor of the State, the Secretary of State, the Auditor of State, the Treasurer of State, and the Secretary of Agriculture. See Iowa Official Register—1943–1944, p. 156; Code of Iowa 1939, c. 18, sec. 276. The Iowa Official Register for 1943–1944 lists its duties as follows (p. 156): "Among the duties placed upon the Executive Council by the laws of Iowa, are the following: to purchase all stores, supplies and furniture for state departments and officers; the execution of contracts for fuel, lights, repairs; the approval of articles of incorporation and by-laws of building and loan associations, and plan for liquidation of said associations; the custody of supplies for state officers and commissions; the canvass of votes cast for state and district officers; the declaration of changes in classification of cities; the assignment of office rooms to state officers; the appointment of the board of examiners of mine inspectors; the approval of plans for buildings at the state educational institutions, under certain conditions; and the determination of the value at which property may be taken by Iowa corporations and the amount of stock which may be issued on account thereof. The secretary of the Executive Council is also secretary of the Conservation Commission and of the Board of Engineering Examiners."

Petitioner admitted that it had not applied for a permit from the Iowa Executive Council for the amended project, but contended that it was not required to obtain such a permit in order to satisfy the requirements of Section 9 (b) of the Federal Power Act. It contended that no permit could be issued under the Iowa statute, because the authority of the Executive Council is limited to the "waters of the State" (R. 18) whereas the waters of the Cedar River are navigable waters of the United States, and because an essential element of the proposed project was the diversion of waters from the Cedar River through a canal to the Mississippi River (R. 12). It further contended that if the State of Iowa's interpretation of the statute is the correct one, and a State Executive Council permit is required for the project, Chapter 363 of the Iowa Code (particularly Sections 7767, 7771 and 7776 thereof (R. 17, 18)), as so interpreted, is unconstitutional, because the States would then be legislating on matters over which Congress has "plenary control" and such state legislation is superseded as being in direct conflict with the authority vested by Congress in the Federal Power Commission by the enactment of the Federal Power Act under the "Federal Government's authority over navigable waters of the United States" (R. 13).

The State of Iowa, the Iowa Electric Light and Power Company, and other protesting partici-

pants in the proceeding before the Commission (R. 8–10) contended that Chapter 363 of the Iowa Code was valid and that the requirement of an Iowa State Executive Council permit was applicable to the proposed amended project.[4]

The Commission, by its opinion and order of January 29, 1944, found that petitioner had not "presented satisfactory evidence, pursuant to Section 9 (b) of the Federal Power Act, of compliance with the requirements of applicable laws of the State of Iowa requiring a permit from the State Executive Council to effect the purposes of a license under the Federal Power Act" (R. 14). Therefore, although finding that the proposed project called for "a practical and reasonably adequate development" (R. 11), the Commission dismissed the application for license "without prejudice to renewal within one year upon satisfying the requirements of Section 9 (b) of the Federal Power Act" (R. 14). While the Commission was of the opinion that it was "bound by the requirements" of Section 9 (b) of the Act, it stated that "the appropriate place for a determination of the validity of such state laws is in the courts and, if we dismiss the application * * * applicant may seek review of our action and its contentions under Section 313 (b) of the Federal Power Act" (R. 13). On March 7, 1944, the Com-

[4] Substantially similar briefs were filed by the State and the Iowa Electric Light and Power Company.

mission denied petitioner's application for rehearing filed pursuant to Section 313 (a) (R. 14–19, 20).

A petition for review, naming only the Commission as respondent, was then filed in the court below, pursuant to Section 313 (b) of the Federal Power Act (R. 29–36), and the State of Iowa filed a motion for leave to intervene (R. 37–40) which was granted (R. 41). Iowa's motion, filed by the Attorney General pursuant to a resolution of the Executive Council (R. 39–40), quotes the Iowa Code provisions requiring permits for dams and prohibiting diversion (Sections 7767 and 7771, Appendix A, *infra*, pp. 59, 60) and states that (R. 38): "By reason of said provisions of law and the diversion of water involved in the proposed project of petitioner, the executive council of the state of Iowa could not lawfully grant a permit for the erection of the dam proposed."

In the court below, the Commission took the position that, as an administrative agency, it had properly dismissed the application for license and declined to consider the constitutional question (R. 48, note 15); but it argued that the court could and should determine that question. In response to the intervenor's contention that the States had authority, under the Federal Power Act, to veto the licensing of power projects and that Chapter 363 of the Iowa Code prohibited the petitioner's

proposed project,[5] the Commission further took the position that Section 9 (b) of the Federal Power Act did not require that the applicant submit "evidence of compliance" with an unconstitutional state law, and that Chapter 363 of the Iowa Code insofar as it would prohibit construction of this project so conflicted with the Federal Power Act as to be superseded thereby (R. 48–49).

The court below affirmed the Commission's order (R. 72–73) declining to pass upon the validity of the Iowa Statute (R. 47). Observing that the constitutional question presented "is a difficult one" (R. 49), the court held that the petitioner should have assumed the constitutionality of the state law, applied for the state permit, and pursued such remedies as might be available in the State to establish its rights to issuance of the state permit,[6] and, that until it had done so, it

[5] In its brief in the court below, the intervenor argued that "Congress * * * has been zealous to insure that it will not authorize or license the construction of any obstruction in a stream within a State * * * unless that project also is approved by the State" (p. 24) and that project construction was dependent upon joint or concurrent federal and state assent (p. 7).

[6] Action of the Executive Council as an administrative body is reviewable in the Iowa courts by certiorari. *Lloyd v. Ramsay*, 192 Iowa 103, 116–117. Statutory provision is made for issuance of the writ of certiorari in such cases by c. 533, Sec. 12456 of Iowa Code 1939, now superseded by Division XIV, Sec. 306 of the Rules of Civil Procedure of the State of Iowa, c. 278 of Laws of the Fiftieth General Assembly, Iowa, p. 347. This reviewing power would ap-

was in no position to challenge the order of the Commission, which was based upon its failure to do so. The court avoided the issue of constitutionality on the ground that it could not say that the state statute was not "susceptible of any reasonable interpretation consistent with constitutionality", since, in the absence of an Iowa court decision, there were possible interpretations of the Iowa statute under which a state permit could be granted for the project (R. 47–48). The court's opinion made clear, however, that Congress, by enacting the provisions of Section 9 (b) as part of the Federal Power Act, did not intend to require state consent to hydroelectric developments or to give the States a veto power over them (R. 55). But the court felt that, on the facts presented to it, there had been no showing that the Iowa law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and hence, that "the Commission, properly, insisted upon a good faith effort, by its applicant, to comply with the state law" (R. 61).

SUMMARY OF ARGUMENT

I

The plain language of Section 9 (b) of the Federal Power Act indicates its applicability to

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pear to encompass the power to pass on the constitutional validity of the statute under which the executive council acts. Cf. *Weed* v. *Boston*, 172 Mass. 28, 29.

the permit requirements of Chapter 363 of the Iowa Code. While the legislative history of Section 9 (b) indicates that state property laws were intended to be within the purview of Section 9 (b), there is no evidence that Section 9 (b) was to be confined to such laws and a good deal of evidence pointing toward a broader reach.

Chapter 363 of the Iowa Code is applicable on its face to petitioner's proposed project and the Commission properly refused to hold the state law inapplicable in order to save its provisions from alleged conflict with the Federal Power Act.

In the absence of any judicial determination of the validity of Chapter 363 of the Iowa Code and in the light of the prevailing doubt as to the power of an administrative agency to decide constitutional questions (see *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144, 153), the Commission did not commit reversible error when it refused to pass on the constitutional validity of the Iowa law, and its order, denying petitioner's application for a license, was proper.

II

While the court below had power to decide the constitutional question sought to be raised, there is a reasonable ground for its discretionary refusal to do so, and we think that its judgment, remitting the petitioner to its state remedies, should be affirmed. In the absence of any light

from the Iowa courts on the meaning and scope of Chapter 363 of the Iowa Code, the Court of Appeals' disposition of this case comports with well-established principles of comity, and effectuates the obvious Congressional purpose, evidenced in Section 9 (b), to secure cooperation in this field between federal and state governments.

III

If this Court reaches the question of the constitutionality of Chapter 363 of the Iowa code as interpreted by Iowa to prohibit petitioner's project, the issues to be considered are whether Congress intended, by Section 9 (b), to provide for such exercise of state power and, if not, whether such state action is superseded by the other provisions of the Federal Power Act.

Both Iowa and the court below implicitly admit that whatever state laws are superseded by Part I of the Act are not "saved" by Section 9 (b), and this is confirmed by the differences between that Section and Section 27, a clear "saving clause"; by the latitude in Section 9 (b) for administrative discretion; and by the clear purpose of the Section to elicit needed information.

Under the test of supersedure formulated by the lower court, the Iowa code provisions, as applied by the State to prohibit petitioner's proposed project, are superseded by the Federal Power Act because that prohibition is aimed at the very ele-

ment of the proposed project which is essential to the full development of water resources sought by Congress. This does not mean that local needs and state legal standards are overridden, for there are ample provisions for administrative accommodation of the proposed project and the license therefor to local conditions, and careful statutory provisions defining liabilities of the licensee to protect local interests.

The State of Iowa's contention that there is no conflict between the state prohibition and the provisions of the Federal Power Act rests upon too narrow a conception of the purpose of that Act as shown by its legislative history and the affirmative nature and comprehensive scope of its provisions.

The state prohibition applicable here being invalid, it is unnecessary to decide the question of the severability thereof from the rest of the Iowa permit statute. Section 9 (b) affords ample latitude of discretion within which the Commission may decline to compel petitioner to make the repeated applications and engage in the extended litigation which may be necessary to determine finally which, if any, severable portion of the Iowa statute can be held constitutional. At the same time, Section 306 of the Act amply safeguards all legitimate interests of the State.

ARGUMENT

I

The Commission properly dismissed petitioner's application without prejudice to renewal when the requirements of Section 9 (b) of the Federal Power Act were met

Section 7767 of Chapter 363 of the Iowa Code of 1939 requires that a permit be secured from the Executive Council of the State before any dam may be "constructed, maintained, or operated in this State in any navigable or meandered stream for any purpose," and Section 7771 describes the circumstances under which a permit will issue. Appendix A, *infra*, pp. 59, 60. In the absence of any judicial judgment of the invalidity of these state laws, we submit that there can be no doubt as to the propriety of the Federal Power Commission's dismissal of petitioner's application for a license for failure to present "satisfactory evidence, pursuant to Section 9 (b) of the Federal Power Act, of compliance with the requirements of applicable laws of the State of Iowa requiring a permit from the State Executive Council" (R. 14), unless the provisions of Chapter 363 of the Iowa Code were not of the type to which Section 9 (b) was intended to apply or were plainly inapplicable to the petitioner's project.

A. *The provisions of Chapter 363 of the Iowa Code of 1939 fall within the purview of Section 9 (b) of the Federal Power Act.*—Section 9 of the Federal Power Act requires that "each applicant

for a license hereunder shall submit to the commission—

> (b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act.

Section 7771 of Chapter 363 of the Iowa Code provides that a permit may be granted

> If it shall appear to the council that the construction, operation, or maintenance of the dam will not materially obstruct existing navigation, or materially affect other public rights, will not endanger life or public health, and any water taken from the stream in connection with the project is returned thereto at the nearest practicable place without being materially diminished in quantity or polluted or rendered deleterious to fish life, it shall grant the permit, upon such terms and conditions as it may prescribe.

On its face, then, Section 7771, like Section 7767 (Appendix A, *infra*, p. 59), is a state law "with respect to * * * the appropriation, diversion, and use of water for power purposes and

with respect to the right to engage in the business of developing, transmitting and distributing power" within the meaning of Section 9 (b) of the Federal Power Act. *United States* v. *West Virginia*, 295 U. S. 463, 473.

Apparently contending that the Iowa laws in issue are not within the scope of Section 9 (b) because they are not state laws relating to property rights in bed and banks or water, or relating to the right to engage in the power business (Br. 28–36), petitioner ignores the provisions in Section 7767, with respect to the right to engage in the business of constructing, maintaining, and operating a dam for any purpose,[7] and, more im-

[7] *E. g.*, The Commission has given effect to the provisions of Section 9 (b) requiring satisfactory evidence that the applicant has complied with the requirements of the laws of the State within which the proposed project is to be located "with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act" by denying an application for a license, because the applicant had not complied with the laws of the State of Missouri, by securing from the Public Service Commission of Missouri a certificate of convenience and necessity for construction of the project under Section 5193 of the Revised Statutes of the State of Missouri 1929, requiring such a certificate for any construction by a gas corporation, electrical corporation or water corporation. *Gasconade River Power Co.*, 1 F. P. C. 424–427. The Commission has also refused approval of the transfer of a license because of failure of the applicant to submit satisfactory evidence of approval by the Public Service Commission of South Carolina of the sale and transfer of all the properties and franchises, including the license to the applicant, "as necessary to effect the

portant," forgets that "While one may not end with the words of a disputed statute, one certainly begins there." *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 350. Petitioner passes lightly over the words of Section 9 (b) and their apparent applicability to the permit requirements of the Iowa law to rely, primarily, on the legislative history of Section 9 (b). Typical of the legislative material upon which its argument is based is Representative LaFollette's statement before the House (56 Cong. Rec. 9110), that, in Section 9 (b), we are "insisting that the State's rules of property as to water, bed, and banks must have have been fully complied with or license can not issue." But the statements referred to, all of this sort, persuasively show only that state property laws were intended to be covered by Section 9 (b); they do not even tend to show that Section 9 (b) applied to no other state laws relating to "the appropriation, diversion, and use of water for power purposes."

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purposes of a license." *Broad River Power Co.* & *Lexington Water Power Co.*, 1 F. P. C. 363, 364–365. The files of the Commission show that the Commission Secretary has indicated that the Commission would withhold issuance of a license for a project in West Virginia because the laws of West Virginia provide "that no permit to use any part of bed or banks of a stream in this State, or to construct and maintain any power dam or other structures thereon shall be granted except to a corporation created and organized for such purposes under the laws of this State", and because the prospective applicant was not organized in the State of West Virginia.

That Section 9 (b) is broader in scope than petitioner suggests is made clear by Representative Mondell's statements, with respect to Section 9 (b), that the "bill provides that all provisions of the [state] law, whatever they may be, shall have been complied with up to that time" when application is made for a federal license (56 Cong. Rec. 9813), and that the Section serves to notify "the commission that they must proceed in accordance with the State laws, which they must do in any event, whether the provision were in the bill or not." 56 Cong. Rec. 9814. It does not follow that Section 9 (b) grants to the States a veto power over hydroelectric projects on navigable streams in the sense of saving all state laws that might otherwise be superseded by the Federal Power Act and requiring compliance with all such laws (see *infra*, pp. 37–42); but Section 9 (b) does require a showing of compliance with laws like Chapter 363 of the Iowa Code to the extent that such laws are applicable to the project and if such laws are not so inconsistent with the policies and purposes of the Federal Power Act as to have been superseded by that Act.[8] See *infra*, pp. 30–57.

[8] The Commission has rescinded its authorization for issuance of a license upon a showing that the licensee had failed to obtain a construction permit from the Wisconsin Railroad Commission. See *Wisconsin Power & Light Co., Project No. 710*, Seventh Annual Report, Federal Power Commission (1927), p. 134.

B. *Chapter 363 of the Iowa Code is applicable to petitioner's proposed project.*—No argument is needed to show that Chapter 363 of the Iowa Code is, in terms, applicable to the project which petitioner proposes to construct. See Section 7767, Appendix A, *infra*, p. 59. Petitioner's basic contention in this respect, however, is that to save the constitutional validity of Chapter 363, it should and must be construed as inapplicable to a project on a water of the United States, Br. 19.* But constitutional doubts as to state law can hardly serve as a sturdy foundation upon which a federal commission, or even a federal court, may properly read the words "navigable or meandered stream" in Section 7767 to mean "waters of the state" and not "navigable waters of the United States" (R. 17). As the court below stated (R. 45):

> * * * While this is a possible interpretation and one which the State might adopt concerning the streams here involved—especially if it were necessary to do so in order to avoid the challenge of unconstitutionality—we are unable to adopt it, in the absence of a decision to that effect by the

* Petitioner argued below that the diversion provisions in Section 7771 (Appendix A, *infra*, p. 60) apply only to diversion for industrial and not for power purposes. The court below pointed out that there is nothing in the Iowa law to support this view and much against it (R. 45–46), and petitioner has, apparently, acquiesced in that conclusion.

> Iowa courts. Each of the disputed Sections speaks in terms of *navigable* waters. In view of the fact that both State and Federal governments may legislate concerning such waters—each in its own appropriate sphere—we see no reason to give to Chapter 363 the narrow interpretation for which petitioner contends. * * * *

Much the same considerations which moved the Commission to refuse to pass upon the validity of the Iowa Code apply to this question of applicability. We shall, therefore, turn to the Commission's treatment of the constitutional issue.

C. *The Commission's refusal to pass on the validity of Chapter 363 did not constitute an abuse of discretion.*—In the absence of any judicial decision on the constitutional validity of Chapter 363 of the Iowa Code, the Commission felt constrained to assume its legitimacy and to hold that "the appropriate place for a determination of the validity of such State laws is in the courts" (R. 13). As we shall indicate, *infra*, pp. 24–30, it is our position that even the court below, reviewing the Commission's order in this case, did not abuse its discretion in refusing to pass on the validity of the Iowa law here involved. The reasons which lead us to this conclusion serve as well to support the order of the Commission itself.

But, beyond this, administrative agencies have, rather consistently, doubted their power to decide

constitutional questions,[10] and this Court, in *Davies Warehouse Co. v. Bowles*, 321 U. S. 144, 153, said that:

> State statutes, like federal ones, are entitled to the presumption of constitutionality until their invalidity is judicially declared. Certainly no power to adjudicate constitutional issues is conferred on the [Price] Administrator. * * * We think the Administrator will not be remiss in his duties if he assumes the constitutionality of state regulatory statutes, under both state and federal constitutions, in the absence of a contrary judicial determination.

Whether the Federal Power Commission would, under the circumstances of this case,[11] have the power to decide the constitutional issue is a question which need not now be resolved. It is enough

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[10] Compare *Panitz v. District of Columbia*, 112 F. 2d 39, 41–42 (App. D. C.); *Engineers Public Service Co. v. Securities and Exchange Commission*, 138 F. 2d 936, 951–953 (App. D. C.), certiorari granted, Nos. 2 and 3, this Term. See also *In the Matter of Walston & Co.*, 5 S. E. C. 112, 113 (1939); *In the Matter of East Ohio Gas Co.*, 1 F. P. C. 586, and cases cited; *In the Matter of Patterson and the State of Ohio*, United States Civil Service Commission, January 4, 1943, Docket No. 3, Pike & Fischer, Admin. Law, 48f.117. But cf. *In the Matter of White and Weld*, 3 S. E. C. 466.

[11] This case is different from the *Davies Warehouse* case in at least one important respect. Here the constitutional question turns on an alleged conflict between state law and a federal act administered by the Commission itself. In the *Davies Warehouse* case, the state law, if invalid, would be so under the general provisions of the Due Process Clause.

if this Court can say, as we think it can, that the Commission's refusal to decide the validity of the Iowa law was not an abuse of its discretion.

II

The affirmance of the Commission's order by the court below was not an abuse of discretion

In its opinion in this case (R. 13), the Commission suggested that the "appropriate place for a determination of the validity" of the state law "is in the courts", and we submit that there can be no doubt that the court below had the power, in its discretion, to consider and pass upon that question. *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 489. Petitioner, as a "party aggrieved" by the Commission's order, had asked that the order be set aside (and intervenor that it be affirmed) and under Section 313 (b) of the Federal Power Act, the court had "exclusive jurisdiction to affirm, modify, or set aside such order." An illustrative analogy is found in a comparison of the scope of administrative decision and judicial review, when objections to the constitutionality of a statute are made in a proceeding before the agency charged with the administration of the statute and on judicial review of the agency's order. Whatever requirement there may be that the agency assume the constitutionality of the statutory provisions (see *supra*, note 10) in no wise restricts the power of the reviewing court to consider and pass upon the constitutional

question. *E. g.*, compare *Mississippi River Fuel Corporation*, 2 F. P. C. 170, 175, 34 P. U. R. (NS) 8, with the same case on review 121 F. 2d 159, 162 (C. C. A. 8). On review, petitioner "can come into court * * * because he urges errors of law outside the Commission's final say-so." *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 133–134.[12]

However, the Court of Appeals affirmed the Commission's order, declining on grounds of comity to decide the question of constitutional validity of the Iowa statute as applied to the proposed project, saying that there are "possible interpretations" of Chapter 363 which might enable the Iowa courts to avoid holding the law unconstitutional (R. 47–48, 50).

One of these "possible interpretations" which the lower court said the courts of Iowa might adopt was one which it had itself, earlier in its opinion, declined to adopt on its own responsibility (see *supra*, pp. 21–22), viz., that Chapter 363 is inapplicable to the proposed project because "navigable streams" as used in Section 7767 might be held to exclude "navigable waters of the United States" (R. 47). Another "possible interpretation" was that the diversion of the waters of the Cedar River and their discharge into the

[12] "The court has power to pass judgment upon challenged principles of law insofar as they are relevant to the disposition made by the Commission." *Federal Power Commission* v. *Pacific Power & Light Company*, 307 U. S. 156, 160.

Mississippi might be held to be a return "at the nearest practicable place" within the meaning of Section 7771, Appendix A, *infra*, p. 60, presumably because the water ultimately will flow down the Mississippi at and below the point some fifty river miles below the dam, where it would go if allowed to flow naturally down the Cedar and Iowa Rivers into the Mississippi. The third and last "possible interpretation," which, to us, seems more to resemble legislative amendment than judicial interpretation, was that a state court might "so interpret the first Section [Section 7767, Appendix A, *infra*, p. 59] as to allow the issuance of a permit without strict compliance with all its terms." (R. 48).

In the court below, the Commission stated that "the question of the validity of the State statute was properly before the Court for determination" (R. 65), and that the Iowa statute, as construed by the State Attorney General to prohibit construction of the proposed project, was invalid because so in conflict with the Federal Power Act as to be superseded by its provisions. But the court below did not reach the constitutional question, and since we recognize that there is room for reasonable doubt as to the proper approach to be taken, we are not inclined, on this review, to quarrel with the lower court's discretionary refusal to decide whether the Iowa state law has

been superseded by the Federal Power Act in any respect.[13] Cf. *Meredith* v. *Winter Haven*, 320 U. S. 228, 235–236; *United States* v. *Bank of New York Co.*, 296 U. S. 463, 480. On application by the petitioner for a state permit, the Executive Council of Iowa may make decision of the constitutional question unnecessary by either granting

[13] We cannot, however, defend the view of the court below that "the Commission's order must stand" for the "reason alone" that "nothing appears in the record to excuse petitioner's failure to comply with Section 7796" (R. 57) which provides that:

"Whenever the erection of any such dam will affect highways or state-owned lands, the applicant shall as a condition precedent secure a permit from the board, commission, or other official body charged with jurisdiction over and control of said highways or state-owned lands."

The Commission has not placed its decision upon this ground whether because the showing which had been made of compliance with Section 7796 was satisfactory, under Section 9 (b) (see Exhibit D and the state permits attached, Appendix B, *infra*, pp. 64–75) in view of the impracticability of requiring a further showing prior to the issuance of the license, or for some other reason. See *infra*, pp. 39–40. This being so, an affirmance of the Commission's order on grounds not taken by the Commission would violate the rule laid down by this Court in *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 95, in which the Court said: "* * * an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." "For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." 318 U. S. at 88.

the application or denying it on a ground wholly unrelated to the Federal Power Act and the constitutional question of supremacy;[14] even if the Executive Council itself does not take such action, moreover, an appropriate state court may eliminate the constitutional question on review.[15]

By holding that Section 9 (b) requires a good faith effort to comply with the provisions of state law (R. 72) and that petitioner should assume their constitutionality,[16] apply for a state permit, and pursue such remedies as may be available in the State to establish its right to issuance of the permit (R. 48), the lower court has not only moved in the direction of effectuating the cooperation of state and federal agencies contemplated by Congress in the Federal Power Act but has

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[14] *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 545, 546; *Railway Express Agency, Inc.* v. *Virginia*, 282 U. S. 440, 441; *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608; *Lehon* v. *City of Atlanta*, 242 U. S. 53, 56.

[15] *Bachtel* v. *Wilson*, 204 U. S. 36; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 546; *St. Louis Southwestern Railway Co.* v. *Arkansas*, 235 U. S. 350, 368, 369. As to the judicial remedies open to petitioner in Iowa, see *supra*, note 6, p. 11.

[16] We assume that the court did not intend, by saying that petitioner "must assume their constitutionality" (R. 48), to deny to petitioner the right to make such reservations in applying for a permit as may be necessary to enable it to raise in the courts of the State the constitutional questions which it sought to present below. Cf. *Schenley Distillers Corporation, et al.* v. *United States, et al.*, No. 560, this Term, decided January 2, 1946, slip opinion, p. 3.

also accorded appropriate observance to the well-established general principles of comity.[17]

That petitioner may, in some respects, be required to "serve two masters" (cf. Pet. Br. 22–24) if the ruling of the court below is sustained, is not a consummation wholly unintended by Congress. Unless Section 9 (b) is to be given no effect whatever, some evidence of compliance with at least some state laws is a prerequisite to the issuance of a federal license, and the view of the court below, that there is no occasion, in this case, to anticipate conflicts between state and federal authority and the consequent invalidity of the state law, is not an unreasonable one. "To predetermine, even in the limited field of water power, the rights of different sovereignties, preg-

[17] *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496, 500–501; *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101; *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450; *Asbury Hospital* v. *Cass County*, No. 35, this Term, decided November 5, 1945, slip opinion, pp. 4–5; *Great Lakes Co.* v. *Huffman*, 319 U. S. 293, 300–302; *Watson* v. *Buck*, 313 U. S. 387, 401–404; *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168, 171–173. But cf. *Markham* v. *Allen*, No. 60, this Term, decided January 7, 1946, in which an exercise of federal jurisdiction to decide the validity of a state statute, although state proceedings were pending, was justified by reference to the legislative policy evidenced in Section 17 of the Trading with the Enemy Act. See also *Township of Hillsborough* v. *Cromwell*, No. 305, this Term, decided January 28, 1946, slip opinion, pp. 4, 7, in which the state remedies appeared to be inadequate and the court was not wholly unaided, as it is here, by authoritative state constructions of the state statute.

nant with future controversies, is beyond the judicial function." *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 423. Here petitioner, since the modification of its plans,[18] has given the State Executive Council and the Iowa courts no opportunity to express their views on its proposed project with reference to matters which may be peculiarly of local concern; without such an expression, it is difficult to assess the propriety of what is only an anticipated exercise of the State's power.

III

If this Court reaches the question of the constitutional validity of Chapter 363 of the Iowa Code, that Chapter, as applied to petitioner's project, should be held to be superseded by the Federal Power Act

The Federal Power Commission, in this case, is not in the usual position of an administrative agency before the revewing courts, seeking merely to sustain its order. It contends that it correctly disposed of the case, but its opinion doing so makes plain (R. 13) that it regarded such disposition as an intermediate one which would provide a basis for obtaining an authoritative judicial decision on the constitutional validity of the Iowa statute.

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[18] The Executive Council twice refused to issue the petitioner a permit for the construction of the originally proposed single river development which did not involve the diversion of water from the Cedar River to the Mississippi River (Tr. 30, 2999).

As we have pointed out (*supra*, pp. 24–30), we think that the lower court could have decided that question, but that its refusal to do so in the absence of a decision by the courts of Iowa was within the sound exercise of its discretion. However, the Attorney General of Iowa, in his motion to intervene, filed pursuant to a special resolution of the Executive Council (the agency charged with the administration of the state law) (R. 39–40), interpreted the Iowa statute as prohibiting the proposed project because of the contemplated diversion of water from the Cedar River (38). If that interpretation, not yet adopted by the Iowa courts, is clearly correct—if the other "possible interpretations" of Chapter 363 of the Iowa Code are not really acceptable—the question of the constitutional validity of the Iowa Code provisions as applied to the proposed project is presented for decision.[19] Accordingly, the following

[19] Section 9 (b) of the Federal Power Act does not require an applicant for a license to submit evidence of compliance with an invalid state law. *Poindexter* v. *Greenhow*, 114 U. S. 270, 301–306; cf. *United States* v. *Bellingham Bay Boom Co.*, 176 U. S. 211, 215–216; *Porter* v. *Investors Syndicate*, 287 U. S. 346, 347; *Norton* v. *Shelby County*, 118 U. S. 425, 442.

Section 313 (b) of the Federal Power Act specially confers upon the federal circuit courts of appeals and upon the court below a power to "affirm, modify, or set aside" an order of the Commission on petition of "any party to a proceeding under this Act aggrieved by" such order. This jurisdiction is granted "independently of the statutes governing generally jurisdiction of federal courts" (*Markham* v. *Allen*, No. 60, this Term, decided January 7, 1946, slip opinion, p. 4),

discussion of that question is submitted for the Court's assistance in case the question is reached.

Any discussion of the constitutional validity of a state law which depends upon the question of supersedure by the Federal Power Act must begin with what this Court has said with respect to the validity of the Federal Power Act as a broad exercise of the commerce power and with regard to the specific provisions in the Act for the exercise of state powers. *United States* v. *Appalachian Electric Power Company*, 311 U. S. 377.

In that case, the Company contended that the Federal Power Commission was attempting to impose upon it "a license containing unlawful conditions" (311 U. S. at p. 402). Forty-one states joined as *amici* in support of the Company's arguments, insisting that the power of Congress to prohibit the erection in navigable waters of the United States of any structure deemed to impair navigation "does not comprehend a power to exact conditions, which are unrelated to navigation, for the permission to erect such structures", that the imposition of such conditions would cause the States "to lose control of their resources", and

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and in the absence of any special circumstances which would warrant a refusal to exercise it", the refusal of the court below to decide the validity of Chapter 363 serves "to penalize [the petitioner] for resorting to a jurisdiction which [it was] entitled to invoke." *Meredith* v. *Winter Haven*, 320 U. S. 228, 237.

"that a clash of sovereignty arises between the license provisions of the Power Act and state licensing provisions" (311 U. S. at pp. 421–422). The contentions of the State of Virginia, one of the *amici,* are stated as follows (311 U. S. at pp. 422–423):

> The Commonwealth of Virginia advances forcibly its contention that the affirmative regulation of water-power projects on its navigable streams within its boundaries rests with the state, beyond that needed for navigation. "While the supremacy of the Federal Government in its own proper sphere, as delineated in the Constitution, is cheerfully conceded, yet just as earnestly does Virginia insist upon the supremacy of her own government in its proper field as established by that instrument." Virginia has a Water Power Act. It, too, offers a fifty-year license, with the right to use the natural resources of the state, the stream flow and the beds of the water courses for the period of the license or its extensions subject to state condemnation at any time on Virginia's terms for ascertainment of value. Operation is likewise regulated by state law. The Commonwealth objects that the development of its water power resources is subjected to Federal Power Act requirements such as are detailed above in stating the respondent's objection, even to the point that Virginia itself may not build and operate a dam in

> gated power which under the Tenth Amendment remains in the state or the people. The water power statutes of the United States and of Virginia recognize the difficulties of our dual system of government by providing, each in its own enactments, for the exercise of rights of the other.

The federal statutory provisions for the exercise of state powers cited by the Court were Sections 10 (e), 14 and 19 of the Federal Power Act (311 U. S. 377, 429, note 94). Those Sections provide respectively for federal expropriation "of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves"; for preservation of the right of the States "to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings"; and for state regulation of licensee's rates and service to the public, with federal regulation of such rates and service by licensees and by customers of licensees and of securities issued by licensees only until such time as "the State shall have provided a commission or other authority for such regulation and control".

The State of Iowa's contention in this case that Section 9 (b) provides "that the States and National Government should participate jointly in the development and regulation of water power

projects"[20] is an attempt to add that Section to the three cited by the Court. However, Iowa bases its attempts to do so, not on the constitutional ground referred to by this Court in the *Appalachian* case, *supra*, pp. 35–36, but on the statutory ground that by Section 9 (b) Congress must be held to have shared with the States its responsibility and power over waters within a State. It seeks to support its contention by arguing that the purpose of Congress in the enactment of the Federal Power Act, as in the earlier River and Harbor Acts, was limited to the prevention of obstructions to navigable waters of the United States and except where a state permit purports to authorize what is prohibited under the Federal Power Act (Intervenor's Resistance to Petition, p. 19), there is no such repugnancy or conflict as to result in supersedure of the action of the State by federal action.[21]

The exception which intervenor admits to its argument, recognizes, as we think must be recognized, that Section 9 (b) does not require a showing of compliance with a state law which is superseded by the Federal Power Act and was not intended to "save" such state laws from being superseded. The lower court took the same view when it said that it was not the purpose of Congress to require state "consent to the construction

[20] Pp. 13–14, Intervenor's Resistance to Petition for Writ of Certiorari.

[21] *Idem*, pp. 15–19.

and operation of such projects, or to give[22] to the states, a veto power over them" (R. 55).

Confirmation of the conclusion that Section 9 (b) was not intended to "save" state laws, or to require a showing of compliance with state laws which would otherwise be superseded, is found in the fact that the Act contains Section 27, obviously intended to cover the relationship of the Act to state legislation. It is apparent, from a consideration of that Section, that Congress recognized that the usual rules of supersedure would apply to any state laws in conflict with the new federal act and therefore that it was necessary to include explicit provisions to "save", in case of conflict, those state laws which Congress wanted to leave in effect. The state laws so "saved" were strictly limited in that Section to laws relating to "control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses" of the same nature. *Alabama Power Company* v. *Gulf Power Company,* 283 Fed. 606 (M. D. Ala.).[23]

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[22] The lower court thus necessarily recognized that such state laws were not "saved" by Section 9 (b), notwithstanding its statement that Section 9 (b) "just as effectively 'saves' state laws 'with respect to bed and banks [of streams] and [with respect] to the appropriation, diversion and use of water for power purposes' as does Section 27 with respect to laws 'relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses.'" (R. 54).

[23] In that case, which involved the constitutionality of the condemnation provision of Section 21 of the Federal Water

The terms of Section 9 (b) indicate that it was intended for a different purpose. It provides, not that compliance with the state laws is a prerequisite to a right to a federal license,[24] but that the applicant shall submit evidence of compliance

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Power Act, it had been contended that the provisions of the Federal Water Power Act were an invasion of the rights of the State, preserved by Section 27 (among other Sections). The court overruled the constitutional objections, restricting the application of Section 27 to state laws relating to uses of water for "irrigation" and "municipal" uses and other uses of the same nature saying (283 Fed. at 619, 620):

"* * * a proper construction of the Act requires that the words "other uses" shall be construed ejusdem generis with the words "irrigation" and "municipal". The rule is that, when in a statute general words follow a designation of particular subjects or classes, the meaning of the general words will ordinarily be presumed to be restricted by the particular designation. * * * The only apparent exception to this rule is the case where the legislative language has completely exhausted the particular description, which is then followed by words of general import. This, however, is a recognition of the ejusdem generis rule rather than the exception, since all rules of construction require the courts to give some meaning to every word or clause used in the statute if possible. * * *"

A restricted construction of Section 27 is supported by the legislative history of that Section which shows that it was derived from Section 8 of the Reclamation Law of 1902, c. 1093, 32 Stat. 390, 43 U. S. C. 383. See the reprint in Appendix to the Petition for Certiorari, pp. 58–60, of our discussion of the legislative history of the Federal Power Act with particular reference to Sections 9 (b) and 27, originally printed as an appendix to our brief below.

[24] Earlier versions had so provided. See the summary of legislative history taken from our brief in the court below and printed as an appendix to the Petition for Certiorari, pp. 52–56.

"satisfactory" "to the Commission," thus cushioning the requirement within the latitude of the Commission's discretion. Obviously, such discretion is not to be reduced to nothingness by reading the Section as requiring actual state consent to every hydroelectric project; it is to be given a substance often measured by the Commission's needs in administering the Act. And see *infra*, note 25.

In further contrast to Section 27, which expressly precludes any supersedure of the state laws enumerated therein, Section 9 (b) is literally a provision merely for the submission of information by an applicant.[25] Without it, the Commission might be handicapped in satisfying the practical need for information that the applicant has complied, or is in a position to comply, with the state laws enumerated therein. This need arises, particularly, from the provision of Section

[25] Representative Mondell gave two controlling reasons for the inclusion of Section 9 (b) during the debates in the House:

"The first, from the standpoint of water power legislation, is that the water power commission shall have the benefit of all of the information which the states possess relative to the condition of water supply at the point of proposed diversion * * *. The second reason is so that the bill shall carry with it notice to the Commission that they must proceed in accordance with the State laws, *which they must do in any event, whether the provision were in the bill or not*" (56 Cong. Rec. 9813–9814; italics supplied).

It is noteworthy that the last clause confirms the conclusion that Section 9 (b) requires compliance only with such state laws as would be in effect if there were no Section 9 (b); *i. e.*, that Section 9 (b) is not a "saving clause."

7, as to an applicant's ability to carry out a proposed development, and Section 13, limiting construction time. Information thus obtained is also important to enable the Commission to work out a practical accommodation of license provisions to the needs and legal standards which obtain in the localities involved. Often on the basis of such data, the States and the Federal Commission are able to come to mutually satisfactory agreements; cooperation between state and federal agencies has marked the twenty-five-year period during which the Federal Power Act has been in existence.[25]

[25] In addition to the requirements of Section 9 (b), the Act explicitly requires the Commission to give notice of applications for licenses to any State or municipality likely to be interested or affected and to publish notice once each week for four weeks in a newspaper published in the county or counties in which the project and any lands affected are located (Sections 4 (f) and 4 (e)). The Commission's practice of notification is illustrated by the notices given in the instant case which included, in addition to newspaper publication, the sending of written notice to the following: Governor of Iowa, Chairman County Board of Supervisors, Muscatine County, Muscatine, Iowa; Chairman, County Board of Supervisors, Cedar County, Tipton, Iowa; State Board of Conservation, Des Moines, Iowa; Iowa Railroad Commission, Des Moines, Iowa; The Mayor, Muscatine, Iowa; The Mayor, Tipton, Iowa; The Mayor, Wilton, Iowa; The Mayor, West Liberty, Iowa; Senators Guy M. Gillette and Clyde L. Herring and Representative Thomas E. Martin, of Iowa.

As a result of representations received in response to such notices and the data received pursuant to Section 9 (b), the Commission is enabled to write into licenses provisions accommodating local needs and legal standards. Two examples shown by the Commission's files may be cited:

Upon consideration of an application by Safe Harbor

These practical needs for information rather than any intention to save state laws which would otherwise be superseded by the Federal Power Act show the real purpose of the subsection. Any other construction would subject federal licensing to the requirement of actual state consent, a requirement which the legislative history of the Act clearly indicates Congress did not intend,[11] and one which the lower court disclaimed (R. 55).

Construing Section 9 (b), therefore, as requiring compliance with valid state laws of the kinds

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Water Power Corporation for a license for a project on the Susquehanna River about eight miles from Holtwood, Pennsylvania, it appeared that local inhabitants were interested in a bridge across the river at that point and the Commission required, as a condition of the Federal license, agreement by the licensee to grant a right-of-way across its project works and lands for a highway bridge or ferry.

A license issued to Florida Power Corporation for a project on the Ocklocknee River was drawn, after numerous and protracted exchanges of views and conferences with the Florida authorities, to require the licensee to "comply with all lawful requirements by the Florida State Board of Health for the protection of the public health through the control" of the breeding of malarial mosquitoes.

In connection with a situation of the type presented by *New Jersey* v. *Sargent*, 269 U. S. 328, see *Public Papers of Governor Alfred E. Smith* (1923), pp. 557, *et seq.*; *State of New York* v. *Daugherty*, 266 U. S. 642. See also Merrill, *Federal Versus State Jurisdiction over Power Development and its Supervision*, 129 Annals of the American Academy of Political and Social Science (January 1927), p. 132.

[11] A provision expressly requiring state consent was deleted from the bill, and several amendments which would have so provided were rejected. See the summary of legislative history taken from our brief in the court below and reprinted in the Appendix to the Petition for Certiorari, pp. 52–56.

therein described, and not as saving those state laws which would otherwise be superseded, we reach the question whether Chapter 363 of the Iowa Code of 1939, as interpreted by Iowa with reference to petitioner's project, is superseded by the Federal Power Act. For that purpose, we need not question the general formulation of the principles governing the decision of questions of supersedure, which the lower court suggested (R. 60-61):

> The test, then, is not whether a state law happens to block action which a Federal agency may chance to approve. Instead, it is whether the state law frustrates the operation of the Federal law, prevents accomplishment of its purpose, refuses to its provisions their natural effect [citing *Savage* v. *Jones,* 225 U. S. 501, 533; *Asakura* v. *Seattle,* 265 U. S. 332; *Hines* v. *Davidowitz,* 312 U. S. 52, 67]; whether, in short, the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress [citing *Hines* v. *Davidowitz,* 312 U. S. 52, 67; *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148, 157; cf. *Hill* v. *Florida* [325 U. S. 538]]. If it does, then it must yield.

In addition to the cases cited, see *Southern Pacific Company* v. *Arizona,* 325 U. S. 761, 783; *Northwestern Electric Company* v. *Federal Power Commission,* 321 U. S. 119, 125; *Kelly* v. *Washington,* 302 U. S. 1, 10.

Under that test, it is pertinent to inquire whether the state statute, in prohibiting the proposed project, does so upon the basis of facts and under circumstances in which Congress intended, by the Federal Power Act, to encourage development of hydroelectric projects. That it does, appears from the fact that Iowa bans the project because "any water taken from the stream in connection with the project is [not] returned thereto at the nearest practicable place" (R. 38, see Section 7771 of Chapter 363 of the Iowa Code, Appendix A, *infra*, p. 60), while such diversion is essential to the development of water resources contemplated by the Federal Power Act. The Commission found that the "present plans call for a practical and reasonably adequate development to utilize the head and water available, create a large storage reservoir, and make available for recreational purposes a considerable area now unsuitable for such use, all at a cost which does not appear to be unreasonable", only after the originally proposed development had been changed by the addition of the diversion canal and relocation of the power plant so as to utilize the 101-foot fall of the water obtainable by discharging into the Mississippi instead of the 35-foot fall obtainable on the Cedar River (R. 11). The Commission's opinion (R. 11) says that "further changes in design may be desirable, but they are minor in character", thus indicating that the project will then meet the statutory standard, *i. e.* "will be

best adapted to a comprehensive plan for improving and developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement or utilization of waterpower development, and for other beneficial public uses, including recreational purposes". Section 10 (a) of the Federal Power Act.

In contrast to the prohibition in the state statute, the federal act tends to encourage, among other things, whatever may be found to be the most efficient power development, by providing broadly that "improvement and utilization of water power development" is one of the several objectives to be realized by the issuance of licenses. If diversion to another channel will achieve a greater utilization of natural resources, the federal act encourages the accomplishment of that end by setting up as one of the criteria for the guidance of the Commission the development, conservation and utilization of the navigation and power "water resources of the region". (Sections 4 (g) and 7 (a)).

If sanitary conditions or the preservation of fishlife in the natural channel downstream from the dam warrants a requirement for maintenance of some flow of water down the natural channel, even at the price of a slight curtailment of water power development due to the lesser fall of water available there, the Commission's authority, under Section 10 (a), "to require the modification" of the project and, under Section 10 (g), to provide

other conditions, will enable it to work out accommodations of the project and the license therefor to local needs and state legal standards so as to secure that end by some minor changes, such as the opinion refers to, without sacrificing the whole project, as a blanket statutory prohibition against diversion would.[28]

Furthermore, the interests of riparian owners and others in downstream conditions, which a prohibition against diversion may be argued in some fashion to protect, are safeguarded under the Federal Power Act in additional ways, as for example, by the statutory provisions that the licensee "shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property" and that the licensee "shall be liable for all damages occasioned to the property of others" (Section 10 (c)). This includes water rights of others. *Henry Ford and Son, Inc.* v. *Little Falls Fibre Co.*, 280 U. S. 369, 378. In fact, however, petitioner has already obtained options for 98% of the riparian rights between the dam and the Iowa River (Tr. 555, 560–561).

Iowa's view that the state law, as applied to prohibit the proposed project, is not superseded unless it authorizes an obstruction to navigation which the Federal Power Act prohibits (Intervenor's Resistance to Petition, p. 19), takes too

[28] Similarly as to the needs of navigation, which are provided for in Sections 11 and 12 of the Federal Power Act.

narrow a view of the purpose of the federal act, as shown by the legislative history of the act and by the *Appalachian Electric Power Co.* decision already referred to (*supra*, pp. 32–36).

The contention (Intervenor's Resistance to Petition, p. 16) that Congress intended to do no more in the Federal Power Act than in the River and Harbor Act of 1899, which was relatively limited in scope and largely negative in character, ignores a whole chapter of American history—the movement for conservation of natural resources. The Federal Water Power Act of June 10, 1920, now Part I of the Federal Power Act, was the outgrowth of a long debated, widely supported effort of the "conservationists" to secure enactment of a complete scheme of national regulation which would affirmatively encourage and promote the comprehensive development and utilization of the water resources of the Nation, insofar as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted.

Hydroelectric power developments first made their appearance around 1890, prior to which time water power had been used to a limited extent for the generation of mechanical energy. Insofar as hydroelectric developments involved obstructions in navigable waters of the United States, they came within the general terms of the River and Harbor Acts of 1890 and 1899, under which it

was necessary in most instances to secure a special act of Congress, as well as the approval of the Secretary of War and the Chief of Engineers. As a result, Congress passed numerous special acts authorizing such developments. Except for a general provision that they were subject to amendment or repeal by subsequent acts of Congress, the rights thus granted were perpetual in their term and largely without restriction. See Kerwin, *Federal Water Power Legislation*, (1926); Pinchot, *The Long Struggle for Effective Federal Water Power Legislation*, 14 Geo. Wash. L. Rev., 9; and First Annual Report, Federal Power Commission (1921).

The inadequacy of this negative approach to the development of the nation's hydroelectric resources soon became apparent, and by the Dam Act of June 21, 1906 (34 Stat. 386), Congress took the first step toward an affirmative policy by prescribing certain conditions to attach to all authorizations which might thereafter be granted by special acts. Public insistence upon a comprehensive Federal policy with respect to the development of the nation's water power resources continued to increase and came to a head when President Theodore Roosevelt vetoed the Rainy River bill in April 1908 and the James River bill in January 1909 (Sen. Doc. 438, 60th Cong., 1st Sess.; H. Doc. 1350, 60th Cong., 2nd Sess.). Beginning in 1914, numerous bills were introduced to provide for regulation of hydroelectric

developments on navigable waters and similar bills were introduced with respect to such developments on the public domain.* The conservation movement received added impetus when the first World War showed the national importance of a proper development and utilization of our water power resources.

The long-continued Congressional deadlock with respect to the necessary legislation was broken when President Wilson, in January 1918, brought about the creation of a special water power committee in the House of Representatives to consider a combined bill for the regulation of all hydroelectric developments on streams subject to Federal jurisdiction as well as on the public domain. Such a bill was prepared by the Secretaries of War, Interior and Agriculture to provide for "a constructive national program of intelligent, economical utilization of our power resources" and to provide "a method by which the water powers of the country, wherever located, can be developed by public or private agencies under conditions which will give the necessary security to the capital invested and at the same time protect and preserve

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* See the bills cited in the discussion of the legislative history of Sections 9 (b) and 27, taken from our brief below and printed in the Appendix to the Petition for Certiorari, pp. 52–56.

Hydroelectric developments on the public domain had been authorized by permits issued by the Secretary of the Interior under the Act of February 15, 1901 (31 Stat. 790), and in the national forests by the Secretary of Agriculture under the Act of March 4, 1911 (36 Stat. 1235, 1253).

every legitimate public interest" (H. Rep. No. 61, 66th Cong., 1st Sess., pp. 2, 3, 5). After extended legislative consideration, the evolution of a comprehensive and affirmative Federal policy with respect to our water resources culminated in the passage of the Federal Water Power Act of June 10, 1920.

The intention of Congress to secure and promote a comprehensive development of the nation's water resources, and not merely to prevent obstructions to navigation, is apparent from the provisions of the Act, the statutory scheme of which has been several times reviewed and approved by the courts.[20] Perhaps most noteworthy among the provisions to affirmatively encourage development by private interests were the provisions of Section 6 for a fixed license term of not to exceed fifty years and of Section 28 against any legislative amendment or repeal of a license, providing that

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[20] *New Jersey* v. *Sargent*, 269 U. S. 328; *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377; *Clarion River Power Co.* v. *Smith*, 59 F. 2d 861 (App. D. C.), certiorari denied, 287 U. S. 639; *Alabama Power Co.* v. *McNinch*, 94 F. 2d 601 (App. D. C.); *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 123 F. 2d 155 (App. D. C.), certiorari denied, 315 U. S. 806; *Alabama Power Co.* v. *Federal Power Commission*, 128 F. 2d 280 (App. D. C.), certiorari denied, 317 U. S. 652; *Puget Sound Power & Light Co.* v. *Federal Power Commission*, 137 F. 2d 701 (App. D. C.); *Wisconsin Public Service Corp.* v. *Federal Power Commission*, 147 F. 2d 743 (C. C. A. 7), certiorari denied, 325 U. S. 880–881; *Georgia Power Company* v. *Federal Power Commission* (C. C. A. 5), decided January 7, 1946.

security of tenure necessary to obtain proper financing of projects which had been lacking under the River and Harbor Acts; and the provisions of Sections 4 (f) and 5 for preliminary permits to enable applicants to perfect their applications for license.

Other provisions show the broad scope and affirmative nature of the Act. Thus, by Section 10 (a), Congress specifically provided that the projects licensed under Section 4 (e) should be those projects which, in the judgment of the Commission, are "best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes". Congress further granted to the Commission, in Section 10 (a), the authority to require the modification of any project and its plans before approval, if necessary to secure such comprehensive development. The Act also provides, in section 7 (a), that as between conflicting applicants, the Commission may give preference to the applicant whose plans it finds are best adapted to develop, conserve, and utilize, in the public interest, the water resources of the region. Moreover, under Section 7 (b), if the Commission finds that the development of any water resources for public purposes should be undertaken by the

United States itself, the Commission is directed not to approve any application for a project affecting such development but to make the necessary investigation and submit its recommendations to Congress.

The affirmative nature of the statute is further indicated by the provisions of Section 13, requiring prompt construction of a proposed project and providing for termination or revocation of the license if this is not done. See *Arkansas Power & Light Company* v. *Federal Power Commission*, 125 F. 2d 982 (C. C. A. 8). To facilitate construction of licensed projects, Section 21 of the Act makes provision for the exercise of the Federal power of condemnation by licensees.

In addition to these provisions with respect to licenses,[11] Section 4 (g) of the Act authorizes the Commission, upon its own motion, to investigate any occupancy or intention to occupy, for the purpose of developing electric power, any public lands or bodies of water subject to congressional jurisdiction and to issue such orders "as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region." *Pennsylvania Water and Power Company* v. *Federal Power Commission*, 123 F. 2d 155 (App. D. C.), certiorari

[11] Under Section 10 (g) of the Act, the Commission also has authority to prescribe any conditions in the license "not inconsistent with the provisions" of the Act.

denied, 315 U. S. 806; cf. *Wisconsin Public Service Corp.* v. *Federal Power Commission*, 147 F. 2d 743 (C. C. A. 7), certiorari denied, 325 U. S. 880–881; *Georgia Power Company* v. *Federal Power Commission* (C. C. A. 5), decided January 7, 1946.

It is thus clear that, contrary to the contention of the State (Intervenor's Resistance to Petition, p. 16), the Federal Power Act is not a narrowly limited, "negative," enactment, like the River and Harbor Act of 1899, but is a complete scheme of regulation intended to secure and promote the comprehensive development of water resources subject to Federal control, in the public interest.

Intervenor's view of the purpose of Part I of the Federal Power Act as limited to the protection of navigation against obstruction is essentially the same narrow view as that rejected by this Court in the *Appalachian Electric Power Co.* case (311 U. S. at 426):

> * * * The fact that the Commission is willing to give a license for a power dam only is of no significance in appraising the type of conditions allowable. It may well be that this portion of the river is not needed for navigation at this time. Or that the dam proposed may function satisfactorily with others, contemplated or intended. It may fit in as a part of the river development. The point is that navigable waters are subject to national planning and

> control in the broad regulation of commerce granted the Federal Government. The license conditions to which objection is made have an obvious relationship to the exercise of the commerce power. Even if there were no such relationship the plenary power of Congress over navigable waters would empower it to deny the privilege of constructing an obstruction in those waters. It may likewise grant the privilege on terms. It is no objection to the terms and to the exertion of the power that "its exercise is attended by the same incidents which attend the exercise of the police power of the states." [Citing: *United States* v. *Carolene Products Co.*, 304 U. S. 144, 147; Cf. *Mulford* v. *Smith*, 307 U. S. 38, 48.] The Congressional authority under the commerce clause is complete unless limited by the Fifth Amendment.

These being the purposes of the Federal Power Act, the Iowa statute, as interpreted to bar petitioner's project, clearly cannot "be reconciled or consistently stand" with it. *Kelly* v. *Washington*, 302 U. S. 1, 10. The opinion of this Court in *United States* v. *West Virginia*, 295 U. S. 463, 473, which spoke of the grant of a state license as a "prerequisite to the application for the federal license" is perfectly consistent with this conclusion. The Court there had reference to a state license under a statute which, far from prohibiting a federally licensable project on any ground,

provided that "nothing contained in this act shall be construed to interfere with the exercise of the jurisdiction by the government of the United States over navigable streams". The opinion refers to that provision of the West Virginia statute (295 U. S. at 472) and makes clear that in the bill which was there dismissed, there had been no allegation of any "act or threat of interference by the State * * * with the exercise of the authority claimed by the United States * * * no allegation that the State * * * has issued any permit which is incompatible with the Federal Water Power Act." The Court concluded "* * * the mere grant of the state license, which the Federal Water Power Act makes prerequisite to the application for the federal license, cannot be said to involve any infringement of federal authority. It does not appear that the State has done more."

The care taken in that opinion to make clear that the state statute did not stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (*supra*, p. 43), confirms the conclusion that the Iowa statute involved in this case, as interpreted to prohibit the project otherwise licensable under the Federal Power Act, is superseded by the Federal Power Act, not "saved" by Section 9 (b), and that a showing of compliance therewith should not be required.

The Iowa prohibition of petitioner's project seems to be based primarily on provisions of Section 7771 with respect to diversion (see Appendix A, *infra*, p. 60). Such an application of Section 7771 operates to negate federal power for no reason which is peculiarly a matter of legitimate state concern and which outweighs the federal interests protected by the Federal Power Act. Cf. *Southern Pacific Company* v. *Arizona*, 325 U. S. 761, 783. That being so, we think the provision, as applied, is void.

While there is a serious question as to the severability of this portion of Section 7771 from the remainder of Chapter 363 of the Iowa Code (see Pet. Br. 19, note 7) that question need not now be decided. Section 9 (b) affords ample authority to the Commission to decline to require one in petitioner's position to make repeated attempts to comply with a state law which has been held invalid in part; if the contrary were true, there might be no end to the applications to the State, subsequent litigation through the federal courts, decisions holding the state ground for denial of a permit unsustainable,[22] and a repeated

[22] The Iowa statute would be equally in conflict with the Federal Power Act if deemed to prohibit petitioner's proposed project for the reason that it would "materially obstruct existing navigation." See Section 7771, Appendix A, *infra*, p. 60.

application to the State. Should Iowa have legitimate objections to petitioner's project, it may, at any time, utilize Section 306 of the Federal Power Act to bring that matter to the Commission's attention.[35] This Court should leave to the Commission the task of determining what further action would be appropriate to the disposition of this cause.

CONCLUSION

For the reasons stated in Points I and II of this brief, the judgment below should be affirmed. If, however, this Court deems it appropriate to decide the constitutional validity of Chapter 363 of the Iowa Code as applied to petitioner's project, it should hold the diversion provisions of Section 7771 of that Chapter unconstitutional and

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[35] Section 306 provides that:

"Any person, State, municipality, or State commission complaining of anything done or omitted to be done by any licensee or public utility in contravention of the provisions of this Act may apply to the Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such licensee or public utility, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such licensee or public utility shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating such complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall find proper."

order the case remanded to the Commission for further proceedings.

Respectfully submitted,

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BRADFORD ROSS,
General Counsel.

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Assistant General Counsel,

LOUIS W. MCKERNAN,
Principal Attorney,
Federal Power Commission.

MARCH 1946.

APPENDIX A

Code of Iowa, 1939, Chapter 363, Mill Dams and Races:

7767 PROHIBITION—PERMIT. No dam shall be constructed, maintained, or operated in this state in any navigable or meandered stream for any purpose, or in any other stream for manufacturing or power purposes, nor shall any water be taken from such streams for industrial purposes, unless a permit has been granted by the executive council to the person, firm, corporation, or municipality constructing, maintaining, or operating the same. (R60, § 1264; C73, § 1188; C97, § 1921; C24, 27, 31, 35, § 7767.)

7768 APPLICATION FOR PERMIT. Any person, firm, corporation, or municipality making application for a permit to construct, maintain, or operate a dam in any of the waters, including canals, raceways, and other constructions necessary or useful in connection with the development and utilization of the water or water power, shall file with the executive council a written application, which shall contain the following information:

1. The name of the navigable, meandered, or other stream in or across which a dam is maintained or it is proposed to construct a dam or other obstruction, and a description of the site for such dam, including the name or names of the riparian owners of the site.

2. The purpose for which the dam is maintained or for which it is proposed to

maintain the same, including the use to which the water is to be put.

3. A general description of the dam, raceways, canals, and other constructions, including the specifications as to the material and plan of construction and a general description of all booms, piers, and other protection works which are constructed in connection therewith, or which it is proposed to erect in connection therewith.

4. The approximate amount of hydraulic power that the dam is capable of developing and the amount of power to be used.

5. A map or blue print on a scale of not less than four inches to the mile, showing the lands that are or may be affected by the construction, operation, or maintenance of the dam, and the ownership of each tract of land within the affected area.

6. Such additional information as may be required by the executive council. (R60, § 1265; C73, §§ 1188, 1189; C97, § 1921; C24, 27, 31, 35, § 7768.)

* * * * *

7771 WHEN PERMIT GRANTED. If it shall appear to the council that the construction, operation, or maintenance of the dam will not materially obstruct existing navigation, or materially affect other public rights, will not endanger life or public health, and any water taken from the stream in connection with the project is returned thereto at the nearest practicable place without being materially diminished in quantity or polluted or rendered deleterious to fish life, it shall grant the permit, upon such terms and conditions as it may prescribe. (R60, § 1269; C73, §§ 1193, 1198; C97, § 1930; C24, 27, 31, 35; § 7771.)

7772 CERTIFICATE OF APPROVAL. No per-

mit shall be granted for the construction or operation of a dam where the water is to be used for manufacturing purposes, except to develop power, until a certificate of the state department of health has been filed with the council showing its approval of the use of the water for the purposes specified in the application. (C24, 27, 31, 35, § 7772.)

* * * * *

7776 CONSTRUCTION AND OPERATION. The executive council shall investigate methods of construction, reconstruction, operation, maintenance, and equipment of dams, so as to determine the best methods to conserve and protect as far as possible all public and riparian rights in the waters of the state and so as to protect the life, health, and property of the general public; and the method of construction, operation, maintenance, and equipment of any and all dams in such waters shall be subject to the approval of the executive council. (C24, 27, 31, 35, § 7776.)

* * * * *

7778 DUTY TO ENFORCE STATUTES. It shall be the duty of the council to require that all existing statutes of the state, including the provisions of this chapter, with reference to the construction of dams, shall be enforced. (C24, 27, 31, 35, § 7778.)

* * * * *

7796 STATE LANDS. Whenever the erection of any such dam will affect highways or state-owned lands, the applicant shall as a condition precedent secure a permit from the board, commission, or other official body charged with jurisdiction over and control of said highways or state-owned lands. (C24, 27, 31, 35, § 7796.)

The Rules of Practice and Regulations of the Federal Power Commission (1938) provide, in pertinent part, as follows:

> SEC. 4.41. REQUIRED EXHIBITS.—There shall be filed with the application for license and as a part thereof the following exhibits, certified in conformity with Sec. 200.4:
>
> * * * * * *
>
> *Exhibit C.*—If special hydroelectric water-power, or irrigation laws of the State or States involved pertain to the construction of the applicant's project, submit copies of such laws or reference thereto. (General State incorporation acts are not desired.)
>
> *Exhibit D.*—Evidence that the applicant has complied with the requirements of the laws of the State or States within which the project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business, necessary to effect the purposes of the license applied for, including a certificate of convenience and necessity, if required. This evidence shall be accompanied by a statement of the steps that have been taken and the steps that remain to be taken to acquire franchise or other rights from States, counties, and municipalities before the project can be completed and put into operation.
>
> *Exhibit E.*—The nature, extent, and ownership of water rights which the applicant proposes to use in the development of the project covered by application, together with satisfactory evidence that the applicant has proceeded as far as practicable

in perfecting its rights to use sufficient water for proper operation of the project works. A certificate from the proper State agency setting forth the extent and validity of the applicant's water rights shall be appended if practicable. In case the approval or permission of one or more State agencies is required by State law as a condition precedent to the applicant's right to take or use water for the operation of the project works, duly certified evidence of such approval or permission, or a showing of cause why such evidence cannot be reasonably submitted shall also be filed. When a State certificate is involved, one certified copy and three uncertified copies shall be submitted.

APPENDIX B

EXHIBIT C

APPLICATION FOR LICENSE BY FIRST IOWA HYDRO ELECTRIC COOPERATIVE

Statement re state laws applicable to project

There are no valid state laws which are applicable to the building and operation of the project as covered by this application, other than those referring to Public Highways and more fully described in Exhibit "D".

VERIFICATION

The above statement has been read by me and is a true and correct statement of the facts to the best of my knowledge and belief.

H. J. STRONG,
Secretary,
First Iowa Hydro Electric Cooperative.

Date: August 8, 1941.

EXHIBIT D

APPLICATION FOR LICENSE BY FIRST IOWA HYDRO ELECTRIC COOPERATIVE

Statement re compliance with state laws

Applicant has procured the following permits from the respective State Agencies having jurisdiction:

1. Permit from Iowa State Highway Commission dated May 29th, 1940, granting applicant

right to make necessary alterations in State Highway. Copy of said permit is attached and forms a part of this Exhibit.

2. Permit from Muscatine County Board of Supervisors granting applicant right to make necessary changes in highway, bridges and public property coming within their jurisdiction, dated August 21st, 1940. Copy of said permit is attached and forms a part of this Exhibit.

3. On May 3rd, 1940, the Cedar County Board of Supervisors passed a Resolution agreeing to grant applicant the right to make the necessary changes in County Highways and public property coming within their jurisdiction. Final permit was issued on July 28th, 1941. Copy of said permit is attached and forms a part of this Exhibit.

VERIFICATION

The above statement has been read by me and is a true and correct statement of the facts to the best of my knowledge and belief, and I hereby certify that the attached are true and correct copies of the above mentioned permits.

H. J. STRONG,
Secretary,
First Iowa Hydro Electric Cooperative.

Date: August 8, 1941.

EXHIBIT D-1

IOWA STATE HIGHWAY COMMISSION

Permit

Whereas, the First Iowa Hydro Electric Cooperative of Muscatine, Iowa, has through its

Secretary, H. J. Strong, expressed its desire to construct a dam in the Cedar River in Sections Two (2) and Three (3) Township Seventy-Seven (77) North, Range Three (3) West of the Fifth (5th) Principal Meridian in Muscatine County, Iowa, commonly known as the "Moscow Dam" and has advised this Commission that when said dam is closed the water level of the Cedar River will be raised to such extent that certain changes will be necessary in the public highway known as "U. S. Road No. 6" which crosses the Cedar River Valley about one-half mile south of the village of Moscow, Iowa, and

Whereas, the said U. S. Road No. 6 is a part of and included in the primary road system of the State of Iowa and is therefore under the control and jurisdiction of the Iowa State Highway Commission, and

Whereas, the said First Iowa Hydro Electric Cooperative of Muscatine, Iowa, has by its Secretary filed application with the Iowa State Highway Commission for a permit under the provisions of Section 7796 of the 1939 Code of Iowa, to make or cause to be made such changes in said U. S. Road No. 6 as may be necessary because of the construction of said Moscow Dam, and

Whereas, data filed with the Iowa State Highway Commission by the said First Iowa Hydro Electric Cooperative indicates that at the maximum elevation of the pool proposed to be created by the said Moscow Dam, and at maximum flood stage of the said Cedar River, the said present U. S. Road No. 6 crossing the Cedar River Valley will be inundated to a maximum depth of

about six feet and that approximately two miles of said road will be so inundated,

Now therefore, Be It Resolved By The Iowa State Highway Commission,

I. That a permit is hereby given to the said First Iowa Hydro Electric Cooperative to reconstruct and raise said U. S. Road No. 6 across the Cedar River Valley near the village of Moscow in Muscatine County, Iowa.

II. That this instrument shall constitute the permit contemplated by Section 7796 of the Code of 1939, and is granted solely in consideration that the First Iowa Hydro Electric Cooperative shall agree to and shall perform and shall conform to the following conditions and requirements:

a. Said highway shall remain on the present location and alignment.

b. The said highway and highway structures thereon, or pertinent thereto, shall be raised and reconstructed to such elevation that the travelled surface at the center of the roadway shall at no point be less than five (5) feet above the surface of the water in the pool or reservoir at its maximum height, and at maximum flood stage of said Cedar River.

c. The plans, specifications and contracts for the raising and reconstruction of said highway and structures shall be subject to approval by, and all construction work shall be under the direct supervision of the Iowa State Highway Commission and shall conform to recognized standards of construction for highway and highway structures as adopted by the American Association of

State Highway Officials and the general specifications of the Iowa State Highway Commission.

d. Before starting any construction work on the said Moscow Dam the First Iowa Hydro Electric Cooperative shall deposit with the Iowa State Highway Commission or the Treasurer of the State of Iowa, $300,000.00, which shall be used to pay the cost of raising and reconstructing said highway and highway structures, the providing surfacing and maintaining of an adequate surfaced detour for use of the travelling public during the progress of reconstruction, and all other expense incident to the raising and reconstruction of said highway and structures; it being understood and agreed that said fund may not be withdrawn, nor any part thereof diverted to any other purpose until the raising and reconstruction of said highway and structures is completed and approved by the Highway Commission and all costs incident thereto fully paid from said fund so deposited.

e. Should the completed cost of raising and reconstructing the highway and highway structures referred to herein be less than the sum of $300,000.00 the residue of the funds so deposited shall be returned to the First Iowa Hydro Electric Cooperative; and on the other hand, should such raising and reconstruction exceed said sum of $300,000.00 so deposited, then and in that event, the First Iowa Hydro Electric Cooperative agrees to pay the Iowa State Highway Commission on demand the full amount of said excess.

III. That it is fully understood and expressly intended that the approvals and supervision of all

work pertaining to the raising and reconstruction of said highway and highway structures is for the purpose only of securing and assuring conformity with recognized standards of highway construction, and that neither the Iowa State Highway Commission nor the State of Iowa is participating in any of such construction or expenditures made therefor in such manner and to such extent as to incur liability to any person or persons whomsoever in connection with said project or projects; and it is further understood and expressly intended that the grant of permit herein and/or the approvals and supervision herein contemplated shall not operate as a consent of the State to be sued, or as a waiver of its constitutional immunities from suit, nor as a pledge of good faith of the State of Iowa or the Iowa State Highway Commission to the completion of said Hydro-Electric project.

IV. That the First Iowa Hydro Electric Cooperative by acceptance of this permit as herein set forth thereby agrees to hold the State of Iowa, the Iowa State Highway Commission, its agents and employees, safe and harmless from payment of any expense of litigation and/or any and all claims of whatsoever nature and kind arising out of any of the projects herein referred to.

V. That the First Iowa Hydro Electric Cooperative by acceptance of this permit as herein set forth further agrees that upon failure to conform to or perform any of the requirements and/or conditions herein specified the Iowa State Highway Commission may revoke this permit, and the same shall become null and void upon notice of

such revocation being mailed by registered mail to the President or Secretary of said Cooperative at its last known address or the home address of said Cooperative.

VI. That this permit is not transferable.

VII. That subject to the requirements and conditions herein set forth this permit shall become effective upon acceptance thereof by Resolution of the Board of Directors of said First Iowa Hydro Electric Cooperative and evidenced by the signature hereto of the President and attested by the Secretary.

VIII. That this permit shall be null and void if the First Iowa Hydro Electric Cooperative shall fail to construct and complete said Moscow Dam project as contemplated in Section 7792 of the Code or a revocation or forfeiture is accomplished as in said Section 7792 provided; it being further understood and agreed that a revocation or forfeiture of the Executive Council permit granted, as provided in Chapter 363 of the Code, likewise operates to revoke and forfeit this permit herein granted.

This Resolution adopted this 29th day of May 1940.

IOWA STATE HIGHWAY COMMISSION
By RANDALL WILSON, *Chairman*
R. B. LAIRD
GUS A. OLSON
A. H. HURST
L. M. EICHER
Commissioners.

Attest:
WAYNE J. FLUERT
Secretary

Accepted this first day of June, 1940.

FIRST IOWA HYDRO ELECTRIC COOPERATIVE.

By F. A. E. GILLMOR, *President.*

Attest:

H. J. STRONG
Secretary

EXHIBIT D–2

MUSCATINE COUNTY PERMIT

Resolution passed at special session held August 21, 1940

Moved by F. G. Wilford, Seconded by John Foley that the following Resolution be adopted, and after due consideration by the Board the Resolution was adopted by a unanimous vote for the Resolution.

RESOLUTION

Whereas, the First Iowa Hydro Electric Cooperative of Muscatine, Iowa, has through its Secretary, H. J. Strong, expressed its desire to construct a dam in Cedar River in Section Two (2), Three (3), Eleven (11), and Twelve (12) Township Seventy-seven (77) North, Range Three (3) West of the Fifth (5th) Principal Meridian in Muscatine County, Iowa, commonly called the "Moscow Dam", and has advised this Board of Supervisors that when said dam is closed the water level of the Cedar River will be raised to such extent that certain changes will be necessary in the public highways and approximately seventeen (17) bridges in the Cedar River Valley in

the area affected by the above described dam in the County of Muscatine, State of Iowa, and

Whereas, these public highways and bridges in the affected area of this proposed lake being under the jurisdiction of the County Board of Supervisors of Muscatine County, Iowa, and will be affected by the building of the proposed project, and

Whereas, the County Board of Supervisors, Muscatine County desires for itself, the County, and its people, full protection and consideration for all damages to bridges, highways, highway routes, and other public interests and property under its jurisdiction, and

Whereas, this is a permit, insofar as this Board of Supervisors has authority, to construct said dam and its appurtenances under the following conditions, to wit:

It is mutually stipulated by the Muscatine County Board of Supervisors and the First Iowa Hydro Electric Cooperative that the above permit for the alteration, and changes and abandonment of the said highways, bridges, and public property shall be mutually arranged for, agreed upon, and approved as to plans, procedure, and expense by the said Muscatine Board of Supervisors, by all authorities, and by the First Iowa Hydro Electric Cooperative before any construction work is commenced on any part of the project by the First Iowa Hydro Electric Cooperative.

E. R. SWICKARD
Secretary

GEO. L. SAUER
Chairman of Board

I, E. R. Swickard, do hereby certify that I am the duly elected and qualified County Auditor and Secretary to the Board of Supervisors of Muscatine County, Iowa.

I further certify that the above Resolution is a true and correct copy of the same as passed by the Board of Supervisors of Muscatine County, Iowa, on the 21st day of August, 1940.

Given under my hand and seal this 21st day of August, 1940.

[SEAL] E. R. SWICKARD
County Auditor in and for
Muscatine County, Iowa.

EXHIBIT D–3

CEDAR COUNTY PERMIT

Resolution

Whereas the First Iowa Hydro Electric Cooperative of Muscatine, Iowa, (a non-profit Cooperative Association incorporated under the laws of Iowa) has requested through and by its Secretary, Mr. H. J. Strong, a permit from the County Board of Supervisors of the County of Cedar, State of Iowa, and

Whereas, this Board of Supervisors is desirous of cooperating with the sponsors of the proposed Hydro Electric project in the Cedar River, and

Whereas, said Hydro Electric project will be partially located in this County of Cedar, State of Iowa, and

Whereas, said project may affect certain public roads, highways, bridges or other property coming under the jurisdiction of the County of Cedar, and

Therefore, we hereby Resolve to issue, grant and give to the said First Iowa Hydro Electric Cooperative our approval and intend this to be a permit in so far as the law provides such authority to this Board of Supervisors to change, alter, reconstruct, abandon any road, highway, bridge or other property coming under or within our jurisdiction as may be necessary or required in the building or operation of said Hydro Electric project, with the following expressed understanding, to-wit:

That no change, alteration, construction, reconstruction, abandonment or other commencement shall be had or begun until each item is agreed to in method, detail or condition as to such changes, alterations, construction, reconstruction or abandonment of said roads, highways, bridges, or property by this Board of Supervisors of Cedar County.

The purpose and intent of this action is to provide the First Iowa Hydro Electric Cooperative with our permission so it may proceed to do its preliminary work and at the same time secure for the County of Cedar the right to agree to what is done under such permit after the preliminary work is completed and before any actual construction is commenced.

It is specifically agreed that this permit shall be binding upon this Board only insofar as said Board is empowered to act by law, and that any change, alterations or re-establishment of highways shall be in accordance with the provisions of the statutes of the State of Iowa, and that no such alterations, changes or reconstruction shall be made or commenced until full and complete

settlement shall have been made by the applicant for permit for any and all damages incurred in such changes to Cedar County.

It was moved by Sup. Crees seconded by Sup. Thomson that the above Resolution be adopted.

Ayes: Thomson, Crees, Fraseur.

Absent: Crist.

Resolution adopted.

I, L. C. Hamiel, County Auditor of Cedar County, Tipton, Iowa, hereby certify that the above Resolution was adopted by the Board of Supervisors of Cedar County in adjourned regular session of July 28, 1941, as recorded in Minute Book 11.

Dated at Tipton, Iowa this 28th day of July, 1941.

[SEAL]

L. C. Hamiel,
L. C. HAMIEL,
Auditor.

EXHIBIT E

APPLICATION FOR LICENSE BY FIRST IOWA HYDRO ELECTRIC COOPERATIVE

Statement re water rights

Applicant owns no water rights at present.

After the grant of a license, applicant contemplates obtaining the necessary water rights through the purchase of land and through the application of his rights of eminent domain.

Applicant has agreements with the Federal Construction Company by which he will acquire practically all of the riparian rights to all of the land on the Cedar River from the site of the primary diversion dam and extending to the junction of

the Cedar and Iowa Rivers. The diversion of water from the Cedar River will, therefore, raise no legal obstacles as far as property holders are concerned.

It is the opinion of our Counsel that our present State Charter, combined with the license from the Federal Power Commission, will enable us to obtain all the necessary water rights.

Applicant is advised by Counsel that there is no provision in the State Law by which he may obtain the use of water for diversion from the Cedar River to the Mississippi and that no valid state law exists which is applicable to his project.

Applicant has complied with all state requirements such as those referring to Public Highways, Public Property and Public Health.

VERIFICATION

The above statement has been read by me and is a true and correct statement of the facts to the best of my knowledge and belief.

H. J. STRONG,
Secretary,
First Iowa Hydro Electric Cooperative.

Date, August 8th 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1942